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No. 99-2036

In The

Supreme Court of the United States

THE GOOD NEWS CLUB, *et al.*,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICI CURIAE* OF CHILD EVANGELISM FELLOWSHIP, INC., MAE CULBERTSON, LADETTE ARMSTRONG, MARSHA HALL, MARY TOMMILA, FAMILY RESEARCH COUNCIL, FELLOWSHIP OF CHRISTIAN ATHLETES, AND CAMPUS CRUSADE FOR CHRIST IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI*

Certain of the *amici* are plaintiffs in a similar dispute pending in the U.S. Court of Appeals for the Ninth Circuit. *Amici* Armstrong, Hall, and Tommila desire that their children attend Good News Club meetings. They desire that those meetings occur on the premises of Oakridge Elementary School, for reasons of safety and convenience.

Detailed statements of the interests of the *amici curiae* are set forth in the appendix to this brief. The letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.[1]

STATEMENT OF THE CASE

Amici adopt the Statement of the Case in the Brief of Petitioners.

SUMMARY OF ARGUMENT

The School District contends that the Establishment Clause forbids the Good News Club to meet immediately after school hours on the premises of the Milford Central

[1] Pursuant to Rule 37.6, the *amici* disclose that: (1) no counsel for a party authored this brief, in whole or in part; and (2) counsel for the *amici* have applied for a grant from the Alliance Defense Fund to cover expenses in producing this brief. ADF is a 501(c)(3) organization with offices at 8960 E. Raintree Drive, Suite 300, Scottsdale, AZ 85260. ADF exercised no control over the content of this brief.

School. The *amici* anticipate that this argument will take two forms. First, the School District will argue that a policy granting equal access to religious groups would constitute an impermissible endorsement of religion. Second, the School District has argued and presumably will argue that allowing the Club to meet after school for religious purposes is indistinguishable from the practices struck down in *McCollum v. Board of Education*, 333 U.S. 203 (1948), *Engel v. Vitale*, 370 U.S. 421 (1962), *Lee v. Weisman*, 505 U.S. 577 (1992), and *Santa Fe Independent School District v. Doe*, 120 S.Ct. 2266 (2000).

An equal access policy would not fail the endorsement test as it has been articulated, justified, and applied in this Court's precedents. A well-informed reasonable observer would not infer endorsement of religion from a policy of equal treatment. Speculation about the perceptions of young children does not warrant ignoring the perceptions of the reasonable observer. Establishment Clause values would be undermined, not served, by censoring private religious speech to avoid potential misimpressions about the government's relationship to that speech. Second, an equal access policy is utterly unlike the practices invalidated in cases like *McCollum*, *Engel*, *Weisman*, and *Santa Fe*.

ARGUMENT

I. Granting the Good News Club Equal Access to Meeting Space Would Not Violate the Endorsement Test.

In a number of cases reaching this Court, government agencies claimed that the Establishment Clause justified

their discrimination against religious speech. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). In each, the Court held that equal treatment of the religious speech in question would not violate the Establishment Clause.

The non-discriminatory character of a policy governing speech was an important factor to all Justices rejecting the government's Establishment Clause defense. *See, e.g., Rosenberger*, 515 U.S. at 839 ("a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion"); *id.* at 846 (referring to the Court's "insistence on government neutrality toward religion") (O'Connor, J., concurring); *Pinette*, 515 U.S. at 764 ("we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion") (plurality op.); *id.* at 775 ("[n]one of this is to suggest that I would be likely to come to a different result from the plurality where truly private speech is allowed on equal terms in a vigorous public forum that the government has administered properly") (O'Connor, J., concurring).

In this case, Milford argues that an equal access policy would nonetheless violate the Establishment Clause.[2] To prevail, the School District must overcome the

[2] The Second Circuit did not rule on Milford's Establishment Clause defense. Nonetheless, if the Court credits

fact that neutrality, at the very least, goes a long way towards ensuring the validity of a policy governing private speech. At the outset, their contention contradicts the view held by four Justices that equal treatment of religious speech in a public forum *never* violates the Establishment Clause. *See Pinette*, 515 U.S. at 770 (plurality op.).

Other Justices hold the view that there may be circumstances in which evenhanded policies governing private speech violate the Establishment Clause because they convey a message of endorsement despite their facial neutrality. In her concurring opinion in *Pinette*, Justice O'Connor expressed her view that "an impermissible message of endorsement can be sent in a variety of contexts, not all of which involve direct government speech or outright favoritism." 515 U.S. at 774 (O'Connor, J., concurring). She stated that "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Id.* at 777.

For example, a private religious group might so dominate a public forum that "a policy of equal access is transformed into a demonstration of approval." *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring) (citing *Widmar*, 454 U.S. at 275). "Other circumstances may produce the same effect – whether because of the fortuity of geography, the nature of the particular public space, or the character of the religious speech at issue, among others."

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the Club's Free Speech Clause claim, the *amici* encourage the Court to decide the Establishment Clause question.

Id. at 778. For example, although the group in *Pinette* sought to display its cross under a facially neutral policy, Justice O'Connor observed that "certain aspects of the cross display in this case arguably intimate government approval of respondents' private religious message – particularly that the cross is an especially potent sectarian symbol which stood unattended in close proximity to official government buildings." *Id.* at 776 (O'Connor, J., concurring). *See also Pinette*, 515 U.S. at 785 ("one would not be a dimwit as a matter of law to think that an unattended religious display there was endorsed by the government") (Souter, J., concurring).

The question, then, is whether this case presents circumstances in which a non-discriminatory access policy would undermine Establishment Clause values. The *amici* submit that it does not.

A. The Reasonable Observer Would Not Perceive School District Endorsement of the Club.

Milford's forum has long been open to those wishing to express religious viewpoints on "secular" subjects, and there is no evidence that such speakers (if any) have dominated the forum. There is no reason to believe that those engaging in worship or religious instruction would dominate the forum if granted equal access. If given access, the Good News Club would simply join the Boy Scouts, Girl Scouts, 4-H, and others meeting in Milford Central School after hours. The Club's religious expression would not be out in the open, as was the religious message in *Pinette*, *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), thus

minimizing the possibility that the reasonable observer would attribute their speech to the School District. Indeed, the expression here is not an unattended display, the sponsor of which is not always self-evident, but rather actual speech coming from the mouths of readily identifiable speakers. Moreover, an empty classroom after regular school hours is not the kind of prominent place that might raise suspicions about the government's stance towards the speech there. *See County of Allegheny*, 492 U.S. at 599-600.

The hypothetical reasonable observer[3] would not perceive endorsement of religion were the School District to give the Good News Club the same access afforded other groups. The reasonable observer would be aware of the evenhandedness of Milford's policy, and would know that a variety of groups – religious and secular – had taken advantage of the privileges available under that policy. The reasonable observer would understand that the Club is a private organization independent of the School District. Relatedly, the reasonable observer would know that school officials do not participate in Club meetings or take steps to encourage attendance at those meetings. The reasonable observer would know that parents, not the school or even the children themselves, decide whether a child will attend a Club meeting.

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[3] As discussed in more detail below, the observer whose perceptions matter for purposes of the endorsement test is the well-informed, objective, hypothetical reasonable observer. *See Pinette*, 515 U.S. at 773 (O'Connor, J., concurring); *County of Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711-12 (1985) (O'Connor, J., concurring) ("objective observer").

For these reasons, the reasonable observer would not perceive government endorsement of religion if Milford gave the Club equal access to its facility.

B. The Age of the Children Does Not Justify a Different Analysis or Result.

Milford apparently will contend that the Establishment Clause justifies discriminatory exclusion of the Club from the forum given that elementary-age children attend Club meetings and attend Milford Central School, a school that has students in grades kindergarten through twelve. The *amici* anticipate that they will argue that the children in these age ranges will infer School District endorsement of the Club and that the Establishment Clause requires the School District to exclude the Club in order to prevent such misperceptions.

1. Problems associated with eschewing the reasonable observer.

By focusing Establishment Clause analysis on speculation about what children might perceive, Milford proposes a wholesale reconfiguration of the endorsement test. Presumably it does not suggest the utter rejection of the hypothetical, well-informed, reasonable observer described by Justice O'Connor in her *Pinette* concurrence. Instead, one can presume, it wishes to limit the circumstances in which that observer's perceptions matter. In other words, Milford suggests that the context should determine the identity and characteristics of the observer whose perceptions matter, even to the point of relying

upon an observer whose perceptions are objectively unreasonable. This Court should reject its invitation to such a radical rewriting of the endorsement test.

At the outset, Milford's proposal raises a host of vexing questions. In what circumstances would the perceptions of the well-informed, hypothetical reasonable observer still matter? What is the principled basis for confining her influence to that (as yet undefined) class of cases? How many different "observers" would appear on the legal landscape? What varying degrees of knowledge and understanding might they possess?

Pity the lower federal courts, which would be forced to confront such a dizzying array of new, analytically antecedent questions in every Establishment Clause case. And pity government officials trying to steer a course that will avoid lawsuits brought under either the Free Speech Clause or the Establishment Clause. Much of the criticism leveled at the endorsement test has asserted that it is insufficiently concrete. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 668-679 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part). Whatever the validity of such a critique in the past, there can be no doubt that this accusation would ring true if the identity of the observer whose perceptions "count" changed from context to context.

Aside from the practical problems with the School District's suggestion, its proposal is at odds with the theoretical foundations of the endorsement test. At bottom, the endorsement test seeks to discern the meaning of government action in the political community as a whole,

asking whether the government has made religion relevant to citizens' standing in the political community. *Lynch*, 465 U.S. at 692. In enforcing the Establishment Clause, the Court's concern "is with the political community writ large." *Pinette*, 515 U.S. at 779 (O'Connor, J., concurring). By urging the Court to focus on the possible misperceptions of children, Milford ignores this fundamental focus of the endorsement test.

The precise identity of the observer(s) whose perceptions the School District thinks should matter is not clear. Perhaps the perceptions of actual children matter in their view. Perhaps it is the perceptions of the "average" child. And perhaps it is the perceptions of a hypothetical "reasonable child," a creature unknown to the law. In each case, the test will focus not on the political community writ large, but upon some subset of the population. This is inconsistent with the repeated insistence that endorsement analysis not be conducted this way. For example, Justice O'Connor's concurring opinion in *Pinette* states that "the endorsement inquiry is not about the perceptions of particular individuals or saving isolated adherents from the discomfort of viewing symbols of a faith to which they do not subscribe." 515 U.S. at 779 (O'Connor, J., concurring). Justice O'Connor "disagree[d] that the endorsement test should focus on the actual perception of individual observers, who naturally have differing degrees of knowledge." *Id.*

Focusing on the unreasonable misperceptions of children cannot be squared with the description of the reasonable observer's attributes in *Pinette*. Justice O'Connor wrote separately largely to emphasize that "the endorsement test necessarily focuses upon the perception of a

reasonable, informed observer." 515 U.S. at 773 (O'Connor, J., concurring). She disagreed with Justice Stevens about the quantum of knowledge attributed to the test's reasonable observer, declaring that the observer should be deemed "more informed than the casual passerby postulated by Justice Stevens." *Id.* at 779.

In her view, "the endorsement test creates a more collective standard to gauge 'the "objective" meaning of the [government's] statement in the community.' " *Id.*

> In this respect, the applicable observer is similar to the 'reasonable person' in tort law, who 'is not to be identified with any ordinary individual, who might occasionally do unreasonable things,' but is 'rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'

Id. at 779-80 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 175 (5th ed. 1984)).

To replace the reasonable observer, who "is presumed to possess a certain level of information that all citizens might not share," with a child is to turn the endorsement test on its head. The reasonable observer is the polar opposite of most children, whose need to be conformed to community ideals of reasonable behavior is a primary rationale for education and parenting. Instead of looking to a "community ideal" to determine the meaning of the government's action in the political community, the School District would have this Court look to the opposite end of the spectrum to determine the constitutionality of private religious speech in public places.

The Establishment Clause does not categorically forbid the government from taking any action that might cause someone to believe that it is endorsing religion. Put differently, Americans do not possess an absolute, inviolable "right" to be free from any perception – however inaccurate or unreasonable – that the government is endorsing religion. Were it otherwise, scores of previously permissible actions would become impermissible.

Justice O'Connor's concurring opinion in *Wallace v. Jaffree*, 472 U.S. 38 (1985), is instructive. In agreeing that Alabama's moment of silence law violated the Establishment Clause, she wrote separately to explain why moment of silence laws in other states would pass constitutional muster. Justice O'Connor observed that the typical statute "calls for a moment of silence at the beginning of the schoolday during which students may meditate, pray, or reflect on the activities of the day." 472 U.S. at 71. She distinguished such statutes from the practices invalidated in *Engel v. Vitale* and *Abington School District v. Schempp*, 374 U.S. 203 (1963). A moment of silence, unlike prayer or devotional Bible reading, is not inherently religious. *Id.* at 72. Moreover, a student could participate in the moment of silence without compromising his or her religious beliefs. *Id.*

Justice O'Connor did not consider whether a young child might infer government endorsement of prayer from the government's moment of silence requirement. Such an inference is not implausible; nonetheless, it did not affect the analysis. Justice O'Connor explained that "[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state

endorsement of prayer in public schools." 472 U.S. at 76. A moment of silence law "that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over the others, should pass the test." *Id.*

The result in this case is *a fortiori*. The permissible moment of silence laws identified by Justice O'Connor in her *Wallace* concurrence permitted children to engage in prayer during compulsory class time. One cannot doubt that non-praying children would almost certainly know that certain of their classmates were praying, and that the school had afforded them the opportunity so to do. Indeed, it is quite possible that both praying and non-praying children would infer school endorsement of prayer from the moment of silence. Yet this was not material to Justice O'Connor, who continued to hold the view that only the perceptions of the knowledgeable, objective observer are relevant to endorsement analysis. 472 U.S. at 76, 78.

2. Examining children's unreasonable misperceptions is unsupported in law.

Milford may try to use this Court's dicta, in certain Establishment Clause cases, about the relative impressionability or immaturity of young children to support its position. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 584 (1987); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 383, 385, 390 (1985); *Tilton v. Richardson*, 403 U.S. 672, 686 (1971). These statements do not support examining and

deeming material the unreasonable misperceptions of some children.

It is common ground that the Establishment Clause forbids government from engaging in religious indoctrination, from coercing citizens to participate in religious exercises, and from directly and tangibly supporting indoctrination undertaken by others. *See, e.g., Santa Fe Independent Sch. Dist. v. Doe*, 120 S. Ct. 2266 (2000); *Mitchell v. Helms*, 120 S. Ct. 2530 (2000); *Engel v. Vitale*, 370 U.S. 421 (1962). To the extent that it is germane at all, the impressionability of young children is relevant to the application of *these* principles rather than to the identity of the observer whose perception of the relationship between church and state matters under the endorsement test. In other words, the alleged susceptibility of younger children to "indoctrination" does not mean that the Court should abandon the reasonable observer when younger children are in the picture.

The Court's cases suggest that whether government's own or government-sponsored religious speech will tend to "indoctrinate" may depend in part upon the nature of the audience to that speech. For example, a legislative chaplain's prayer is unlikely to "indoctrinate" individual legislators. *Marsh v. Chambers*, 463 U.S. 783 (1983). Also, adult legislators are far less likely to be coerced into joining the chaplain's prayers than are those attending public school football games or graduation exercises. *Compare Marsh with Santa Fe*, 120 S. Ct. 2266, and *Lee v. Weisman*, 505 U.S. 577 (1992).

This Court has expressed concern about the susceptibility of young children to indoctrination only when *the*

government itself engages in religious expression or directly and tangibly supports religious indoctrination. *See, e.g., Tilton*, 403 U.S. 672; *Edwards*, 482 U.S. 578. For example, this Court has stated that government aid to a religious college is less likely to support indoctrination than aid to a religious elementary school, in part because college students are simply less susceptible to efforts at indoctrination than are young children. *Tilton*, 403 U.S. at 686.

As a consequence, the *Tilton* Court deemed aid to religious universities less problematic than aid to secondary and elementary parochial schools (a program of which was invalidated the same day in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). In addition to observing that religious universities are far less likely to engage in what one might call "indoctrination," the Court noted that "college students are less impressionable and less susceptible to religious indoctrination" and that "[t]he skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations." *Id.* at 686.

In short, the age of children has been relevant to this Court in the sense that younger children are more susceptible to indoctrination and pressure to participate in religious exercises like prayer than are older children and adults. This impressionability is simply a different issue than the possibility that young children will erroneously infer government endorsement of religion from governmental equal treatment of religion. Because the Milford School District is not engaging in religious expression, coercing others to participate in religious exercise, or

directly and tangibly supporting religious indoctrination,[4] the age of the children involved in this case is not relevant.

In only one case has the Court relied upon the alleged inability of young children accurately to discern the relationship between the state and religion in striking down government conduct under the Establishment Clause. In *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), in which the Court struck down public aid to religious schools, Justice Brennan stated that interaction between church and state "is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice." 473 U.S. at 390. The Court held that Grand Rapids' support of parochial schools was unconstitutional in part because such support provided a "crucial symbolic link between government and religion, thereby enlisting – at least in the eyes of impressionable youngsters – the powers of government to the support of the religious denomination operating the school." *Id.* at 385. In other words, even though the aid programs neutrally supported both secular and religious nonpublic schools, the Establishment Clause forbade Grand Rapids from engendering this perception.

Of course, the "symbolic union" component of the *Ball* Court's reasoning was expressly repudiated by this Court in *Agostini v. Felton*, 521 U.S. 507 (1997). The

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[4] It is too late in the day to argue that granting equal access to meeting space, without more, implicates the Establishment Clause's "no aid" principle.

Agostini Court observed that its more recent cases had "undermined the assumptions upon which *Ball* and *Aguilar* [*v. Felton*, 473 U.S. 402 (1985)] relied." 521 U.S. at 222. One of these was the assumption that "[t]he presence of public teachers on parochial school grounds . . . created a 'graphic symbol of the "concert or union or dependence" of church and state,' especially when perceived by 'children in their formative years.' " *Id.* at 220. The Court declared that its 1993 decision in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), had repudiated the assumption underlying *Ball* and *Aguilar* that "the presence of a public employee on private school property creates an impermissible 'symbolic link' between government and religion." 521 U.S. at 224. Nowhere does the Court's opinion suggest that the cognitive abilities of elementary school children changed dramatically between 1985 and 1997; instead, the *Agostini* Court simply understood that a child's misperception of neutrality as endorsement should not drive Establishment Clause analysis.

Milford may argue that dicta in two other opinions suggest that the age of children might affect endorsement analysis. In *Widmar v. Vincent*, the Court concluded that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices." 454 U.S. at 274. In a footnote supporting this conclusion, the Court noted that "[u]niversity students . . . are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." *Id.* at 274 n. 14. In *Board of Education v. Mergens*, a school district argued that its compliance with the Equal Access Act

would cause secondary school students to perceive official support of religious clubs. 496 U.S. at 249. In a portion of her opinion joined by three other Justices, Justice O'Connor rejected this contention in part because "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Id.* at 250.

The *amici* anticipate that the School District will invoke these statements in arguing that the Establishment Clause justified its action. At the outset, it is difficult to square such an argument with this Court's disinclination to differentiate among various levels of schools in other Establishment Clause cases. For example, Justice O'Connor stated that the "insistence on government neutrality toward religion explains why we have held that *schools* may not discriminate against religious groups by denying them equal access to facilities that the *schools* make available to all." *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring) (emphasis added). Similarly, in *Santa Fe*, the Court declared that "nothing in the Constitution as interpreted by this Court prohibits *any* public school student from voluntarily praying at any time before, during, or after the schoolday." 120 S. Ct. at 2281 (emphasis added). Furthermore, neither *Agostini* nor *Mitchell v. Helms* deemed it significant that some of the schools receiving aid were elementary schools.

In addition, the plurality opinion in *Mergens* itself cites *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), for the proposition that students can understand the distinction

between neutrality and endorsement. *Mergens*, 496 U.S. at 250 (plurality op.). One of the students in *Tinker* attended junior high school, and there can be little doubt that *Barnette* applies to elementary school students. Finally, in *Wallace v. Jaffree*, 472 U.S. 38 (1985), Justice O'Connor did not differentiate between elementary and secondary school students in assessing the validity of Alabama's moment of silence law. Indeed, she repeatedly referred to the "objective observer" and emphasized that he or she would be "acquainted with the Free Exercise Clause and the values it promotes." 472 U.S. at 76, 77, 83.

To the extent that Milford may attempt to read into *Widmar* and *Mergens* some dicta about elementary schools, it should be repeated that *Agostini* rejected *Ball*'s "symbolic union" rationale. In discussing (but ultimately rejecting) the Westside Board of Education's endorsement claim, Justice O'Connor acknowledged that the Court had "invalidated the use of public funds to pay for teaching state-required subjects at parochial schools, in part because of the risk of creating 'a crucial symbolic link between government and religion, thereby enlisting – at least in the eyes of impressionable youngsters – the powers of government to the support of the religious denomination operating the school.' " *Mergens*, 496 U.S. at 250 (quoting *Ball*, 473 U.S. at 385). Although Justice O'Connor rejected the extension of *Ball*'s reasoning in part because of the relative maturity of secondary school students, one can now safely say that the Court's subsequent decision in *Agostini* repudiates *Ball*'s approach without regard to the age of the children involved. Therefore, this Court should reject any effort by Milford to twist *Widmar* or *Mergens* to argue that the Establishment

Clause justified its discrimination against the Good News Club.

Milford also relies upon the defined scope of the Equal Access Act in arguing that a different outcome is warranted in the elementary school context. In its opposition to the Club's certiorari petition, Milford argued that the Equal Access Act's coverage of secondary school students meant that Congress had determined that students below the secondary school level could not understand government neutrality toward religion.

The Act itself refutes that argument, providing that "[n]othing in [the Act] shall be construed to authorize the United States or any State or political subdivision thereof . . . to abridge the constitutional rights of any person." 20 U.S.C. § 4071(d)(7). As the Ninth Circuit concluded in *Garnett v. Renton School District No. 403*, 987 F.2d 641 (9th Cir. 1993):

> Section 4071(d)(7) is a "savings" clause that protects against reading implications in the EAA which might abridge federal constitutional rights, either for persons and schools within its scope, or for those outside its scope, such as secondary school teachers and *elementary school students*.

987 F.2d at 645 (emphasis added). In § 4071(d)(7), Congress made clear that its protection of secondary school students was not to be used to restrict the constitutional rights of those not included in the coverage of the Equal Access Act.

II. Granting the Club Equal Access to School Facilities Does Not Pressure Students Into Participating in Religious Exercises.

In its opposition to the Club's petition for a writ of certiorari, Milford argued that if it allowed the Club to meet after school, it would run afoul of this Court's decisions in *McCollum v. Board of Education*, 333 U.S. 203 (1948), *Engel v. Vitale*, 370 U.S. 421 (1962), *Lee v. Weisman*, 505 U.S. 577 (1992), and *Santa Fe Independent School District v. Doe*, 120 S. Ct. 2266 (2000). The government's conduct in those cases differs dramatically from the equal treatment the Club seeks in this case. An equal access policy would not implicate the Court's decisions in these cases.

In *Engel*, *Lee*, and *Santa Fe*, the Court concluded that the government was pressuring students to participate in prayer. In *Lee v. Weisman*, the Court invalidated a Rhode Island school district's practice of inviting local clergy to pray at school graduation ceremonies. By mandating a religious exercise at an event that students were, for all practical purposes, obliged to attend, the school district put those who objected to the prayers in the "untenable position" of choosing between appearing to participate and openly protesting. 505 U.S. at 593. The Court held that the Establishment Clause forbid placing school children in such a position. *Id.* Applying the principles set forth in *Lee*, the *Santa Fe* Court held that a Texas school district's pregame speech policy had "the improper effect of coercing those present to participate in an act of religious worship." 120 S. Ct. at 2280.

It cannot plausibly be argued that students are forced – either by law or the realities of social life in the school – to attend Good News Club meetings. Obviously, New York's truancy laws do not extend beyond the final bell of the day; students are not legally required to participate in *any* after-school meeting, much less the Good News Club meetings. In addition, Club meetings are plainly not like once-in-a-lifetime graduation ceremonies or even like weekly varsity high school football games. In those situations, the Court said that potentially coercive prayer was being added to events most students otherwise wanted to attend, *i.e.*, without regard to whether the event would include prayer. In contrast, students attend Good News Club meetings because their parents desire it and give written permission. Their parents know full well that prayer will be a significant part of the meetings. Unlike graduation ceremonies and football games, those attending Club meetings are present because of prayer, not despite it.

The School District may argue that some children will feel pressure from their peers to attend Club meetings. At the outset, the existence of such peer pressure, by itself, is not constitutionally impermissible. *See Board of Educ. v. Mergens*, 496 U.S. at 251 ("[t]o be sure, the possibility of student peer pressure remains, but there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate"). The critical fact is that students cannot act on that pressure – and thereby participate in inherently religious activities – unless a parent so desires. This is quite different than the situation in *Engel*,

Lee, and *Santa Fe*, in which the pressure to pray was unmediated by parental involvement.[5]

Milford also argued in its opposition to the Club's certiorari petition that allowing the Club to meet would cause it to contravene this Court's ruling in *McCollum v. Board of Education*, 333 U.S. 203 (1948). In that case, of course, the Court struck down an Illinois school district's coordination of religious instruction on school property during compulsory time. The school district did not open its doors to outsiders other than those offering religious instruction. The instructors were "subject to the approval and supervision of the superintendent of schools." 333 U.S. at 208. Students who signed up for but failed to attend religious classes would be reported to their secular teachers. *Id.* at 209. The *McCollum* Court held that the "close cooperation between the school authorities and the religious council in promoting religious education" violated the Establishment Clause. 333 U.S. at 209.

Simply granting the Good News Club equal access to meeting space after school is obviously quite different

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[5] Milford or its *amici* may argue that religious groups like the Good News Clubs will not provide parents enough information about their activities to enable parents to make informed choices about their children's attendance. *Amicus* Child Evangelism Fellowship, Inc., which sponsors Good News Clubs around the country, provides its local volunteers with parental permission slips and brochures that plainly set forth the nature of its activities. In any event, such speculation about the willingness of religious groups to disclose their intentions and about the diligence of parents in learning about the meetings their children will attend does not justify a ban on religious group meetings in elementary schools.

than the close cooperation struck down in *McCollum*. *See Widmar*, 454 U.S at 272 n. 10 (distinguishing *McCollum*). Although Club meetings, like the religious instruction in *McCollum*, would occur on school grounds, those meetings would *not* occur during compulsory class time. Therefore, an equal access policy would not "afford[ ] sectarian groups an invaluable aid" by providing "pupils for their religious classes through use of the state's compulsory public school machinery." 333 U.S. at 212. To be sure, one might plausibly contend that the Club would "take advantage" of the state's compulsory education laws by holding meetings immediately after school. However, the Court's subsequent decision in *Zorach v. Clauson*, 343 U.S. 306 (1952), forecloses any suggestion that this violates the Establishment Clause. Indeed, *Zorach* declared that "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs," it does not violate the First Amendment. *Id.* at 313-14. In this case, the Club is not asking Milford to adjust the schedule of classroom instruction to suit its needs; it is simply asking that Milford give it the same after-hours access to meeting space available to other community groups.

By permitting the Good News Club to meet immediately after school, the School District would be simply facilitating and making more convenient parents' wishes about the moral development of their children. The Establishment Clause does not require a school district to go out of its way to make it more difficult for parents to pursue their wishes in this regard by categorically

banning such meetings or forbidding them from occurring immediately after school.

CONCLUSION

The *amici* respectfully request that this Court reverse the judgment of the Court of Appeals and remand the case for entry of judgment in favor of the Petitioners.

Respectfully submitted,

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APPENDIX

STATEMENT OF INTEREST

Child Evangelism Fellowship, Inc., (CEF) is a Bible-centered, worldwide organization composed of born-again believers whose purpose is to evangelize boys and girls with the Gospel of the Lord Jesus Christ and to establish (disciple) them in the local church for Christian living. In the United States and Canada, 700 full-time workers and an estimated 40,000 volunteers serve the ministry. CEF was founded by Jesse Irvin Overholtzer in 1937.

As of August 2000, 4,622 Good News Clubs were operating in the United States. Of these, 527 (about 11%) were meeting on public school property after regular school hours. The Court's decision in this case obviously will have a significant impact on CEF's ability to pursue its mission.

Mae Culbertson, Ladette Armstrong, Marsha Hall, and Mary Tommila are among the plaintiffs in *Culbertson v. Oakridge School District*, (In the United States Court of Appeals for the Ninth Circuit, No. 99-36165), a dispute similar to the case at bar.

In October 1995, the Oakridge (Oregon) School District denied a Good News Club continued access to school facilities despite a district policy "encourag[ing] the use of school buildings for community use, for educational and recreational purposes." Oakridge believed that granting the Good News Club access under this policy would violate the Establishment Clause. As a consequence of Oakridge's action, the Good News Club was forced to locate another location for its meetings, away

from the school campus. After Oakridge excluded the Club from school facilities, membership in the Club dropped dramatically. A number of parents expressed concerns about the safety of transporting children to an off-campus location.

The United States District Court for the District of Oregon ruled that Oakridge had violated the plaintiffs' rights under the Free Speech Clause and that the Establishment Clause neither required nor justified that violation. Oakridge appealed the district court's judgment to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals heard oral argument on March 6, 2000. In an order dated October 31, 2000, the Ninth Circuit panel withdrew submission of the case and deferred resolution pending this Court's issuance of an opinion in the instant case.

At all times relevant to the litigation, *amicus* Mae Culbertson was the volunteer instructor of the Good News Club meeting in Oakridge, Oregon. *Amici* Ladette Armstrong, Marsha Hall, and Mary Tommila are parents of children who attended Good News Club meetings in Oakridge.

The **Family Research Council, Inc., (FRC)** is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC seeks to inform the news media, the academic community, business leaders, and the general public about family and religious liberty issues that affect the nation. FRC is committed to

ensuring that the legacy of family, faith and freedom is not forgotten in America. FRC has participated in numerous *amicus curiae* briefs in the United States Supreme Court, lower federal courts, and state courts. Kenneth L. Connor is the President and Janet M. LaRue is the Senior Director of Legal Studies.

The mission of the **Fellowship of Christian Athletes (FCA)** is to present to athletes and coaches, and all whom they influence, the challenge and adventure of receiving Jesus Christ as Savior and Lord, serving Him in their relationships and in the fellowship of the church. Currently, FCA sponsors over 7,700 "huddles" involving an estimated 500,000 students at approximately 24% of the Nation's public schools. Many FCA huddles utilize public school facilities for after hours activities.

Campus Crusade for Christ is an interdenominational, religious organization whose purpose is to introduce people of all ages to the Gospel of Jesus Christ, to help Christian believers to grow in the faith, both through training and through building relationships with other believers, and to help Christian believers to be effective in communicating their faith with others. Among its missionary activities in the United States, Campus Crusade for Christ operates at least five ministries with a direct interest in this case. First, Children of the World is a ministry of Campus Crusade for Christ which has its focus in developing programs designed for elementary school aged children, and training for their parents, and other significant adults in their lives, to help them develop and grow in their Christian faith. In many cases, after-school clubs similar to the one which is the

subject of the within litigation, though not directly affiliated with Campus Crusade for Christ, use its training and materials. Campus Crusade for Christ, through its ministry division, Student Venture, operates after-school clubs for junior high school and high school students, and through its Campus Ministry division, sponsors clubs on college and university campuses. Campus Crusade for Christ, also distributes *The Story of Jesus for Children*, a theatrical film depicting the life of Jesus, based upon the Gospel of Luke, and told from a child's perspective. Campus Crusade for Christ offers other opportunities for training for young people through its Josh McDowell Ministries division.